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Supreme Court of the United States

October Term, 1998

ESTEBAN ORTIZ, *ET AL.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LEGAL ETHICS, CIVIL PROCEDURE, AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The legal ethics, civil procedure, and constitutional law scholars submitting this brief have no interest in the outcome of the particular lawsuit at bar.[1] They do, however, have a strong interest in the proper application of the fundamental principles of due process in class actions. *Amici* are especially concerned about the preservation of the guarantee of adequate representation by class counsel.

The Fifth Circuit's decision in this case endorses a settlement that denies class members due process and, in particular, declares that class counsel, although burdened with serious intra- and extra-class conflicts, provided adequate representation. We urge this Court to overturn that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class action practice has become free-form and nearly uncontrolled by law. Tens of millions of people are now or have recently been absent class members in one lawsuit or another, yet little may be said with any confidence about their rights. Even the most fundamental questions presently lack answers. When, if ever, does the Constitution require that absent class members be given a right to opt out of a class action? May the opt-out right provided by Fed. R. Civ. P. 23(b)(3) and the "predominance" and "superiority" requirements of that subsection be avoided by adding a request for injunctive relief to money damage claims, or by asserting that a defendant might be forced into bankruptcy before the last absent class member is paid? What are the rights of people who now manifest no injury and have no reason to know or even suspect that they have been exposed to something that might later cause injury? How are they to receive "notice" that a court is about to compromise their inchoate, unknown and unknowable claims? When effective notice appears inherently impracticable and claims for money damages are at stake, does due process

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[1] *Amici curiae* are listed in the Appendix. Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

require that absent class members be given a full "back-out" right exercisable once injuries manifest themselves? Or in such circumstances are class actions simply forbidden?

This case raises these fundamental questions. Answering them will help put an end to the "anything goes" approach to class actions that unfortunately has developed in some of the lower courts. No legal system worthy of the name can tolerate the use of procedures without boundaries — devices that validate all actions and invalidate nothing. To redeem the class action as a legitimate and constitutional form of process, we encourage the Court to answer more rather than fewer of the central questions raised by this case and to make clear to the courts below and other lower courts that intense situational pressures will never excuse the sacrifice of fundamental procedural safeguards.

This brief, however, is not about all those questions. It is about one: adequacy of representation.

Adequacy of representation is the due process protection that everyone agrees is owed every absent class member in every class action in every court, state and federal. As the central and constant component of due process in class litigation, adequacy of representation must mean something other than that the result is just. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997) (holding that the fairness of the settlement is "an additional requirement, not a superseding direction" to the requirement, among others, of adequate representation). As Judge Smith said in his dissent from the Fifth Circuit's first opinion in this case, "a substantively adequate result cannot cure procedural injustice." *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 1009 (5th Cir. 1996) ("*Ahearn I*") (Smith, J., dissenting), *cert. granted, vacated, and remanded*, 117 S. Ct. 2503 (1997), *on remand*, 134 F.3d 668 (5th Cir.) (per curiam) ("*Ahearn II*"), *cert. granted*, 118 S. Ct. 2339 (1998). Adequacy of representation must also be treated as more than a question of fact left to the discretion of each trial court, subject only to review for abuse of discretion — a point emphasized by Judge Smith in his dissent from the Fifth Circuit's second opinion in this case. *Ahearn II*, 134 F.3d at 675-76 (Smith, J., dissenting).

Here class counsel, no matter how personally honorable, were burdened by two kinds of disabling conflicts: serious intra-class conflicts, as well as obligations to a group outside the class. In addition to these conflicts, class counsel negotiated a settlement of claims which they had no intention, and in all likelihood no ability, to try as a class action. In most if not all situations, that fact alone raises significant questions about the bargaining leverage possessed by class counsel and therefore about their adequacy. Exacerbating all those problems, class counsel reached general agreement on a class settlement with the defendant parties, Fibreboard, and its insurers, before any of the named plaintiffs had agreed to represent the class's interests.

We urge the Court to hold that the intra-class and extra-class conflicts were each serious enough to render counsel inadequate. Further, we urge the Court to address under what circumstances, if any, class counsel who are unable or unwilling to bring a class action to trial may be considered adequate class representatives. We urge the Court to elaborate on what it referred to in *Amchem* as the "representational responsibilities" of those charged with adequately protecting the class's interests. *Amchem*, 117 S. Ct. at 2236. As to the responsibilities of the named plaintiffs, can those responsibilities be met by representatives who enter the case after class counsel and the defendant have reached a settlement in principle?

Whatever other procedural protections exist to protect the absent class members, the guarantee of an adequate lawyer to represent the class is the most important. Class counsel's actions and judgments can independently undermine or buttress each of the other procedural safeguards, including the protection to be afforded by the district court's oversight and scrutiny. For that reason, no matter what other procedural protections must be provided to the absent class, we urge the Court to emphasize class counsel's responsibilities and to begin delineating the conduct and conflicts that fail to satisfy the promise of adequate representation. Because adequacy of representation is the linchpin of due process for absent class members, the Fifth Circuit's *ad hoc*, deferential, apologetic approach to the issue must not be allowed to stand.

With the rights of so many Americans and the integrity of the judicial process at stake, this Court should act to prevent the evisceration of the due process guarantee of adequate representation by class counsel.

ESSENTIAL FACTS

Despite the complicated factual record in this case, only seven factual matters — all uncontroverted — are necessary to an analysis of the due process issues discussed in this brief.

First, defendant Fibreboard selected the lawyers who would subsequently serve as class counsel. Pet. App. 293a-294a (Dist. Ct. Findings of Fact ¶¶ 91-91 (citing Transcript of Fairness Hearings in District Court ("Tr.") 211-14)). Thereafter, Fibreboard, its insurers, and would-be class counsel (the "settlement proponents")[2] constructed the class and structured the terms of the settlement — all before appointment of the class representatives. Pet. App. 383a-384a (Dist. Ct. Findings of Fact ¶¶ 282-83 (citing Tr. 1169-70)). Class counsel never intended, and indeed may not have been able, to certify the class for trial. Tr. 685, 1593.

Second, class counsel contemporaneously represented and settled the claims of approximately 45,000 clients that they placed outside the class. Tr. 588-89, 610. Under the terms of the extra-class settlement, defendant Fibreboard retained one-half of the settlement payment. Judicial approval of the class action settlement would have triggered payment of the retained money. Tr. 610-13.

Third, the class constructed by the settlement proponents includes currently ill people, currently well people who may or may not get sick in the future, and people not yet born or not identifiable (future children of class members and future spouses).

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[2] We refer to these persons collectively as the "settlement proponents" — not the "settlement parties" — because class counsel are not parties and the absent class members, who are, were neither present nor, as we argue here, adequately represented in the construction of this settlement. The courts below, the settlement proponents, and the objectors tend to speak of the "settlement parties" as "agreeing," "negotiating," and "deciding." This way of speaking obscures the central issues in this case.

Pet. App. 544a-545a (Order Provisionally Certifying Class for Settlement Purposes, Sept. 9, 1993). The class does not include all people with future claims; the settlement proponents placed some of them outside the class. Pet. App. 544a-545a (¶ (b) of class definition).

Fourth, Fibreboard's insurance policy with Continental expired in 1959. Some of the class members were exposed to defendant's asbestos products before 1959, and some were exposed only after 1959. Historically, the pre-1959 claims received larger settlement amounts than the post-1959 claims. Pet. App. 415a-416a (Dist. Ct. Findings of Fact ¶ 347).

Fifth, each claimant that the settlement proponents placed outside the class had a present association with class counsel or with another asbestos lawyer. Pet. App. 544a-545a (Order Provisionally Certifying Class for Settlement Purposes, Sept. 9, 1993).

Sixth, although a guardian *ad litem* was appointed for the class as a whole, subgroups with conflicting interests did not have their own guardians. Moreover, the single guardian was appointed after the settlement had been negotiated. Order Appointing Guardian, Oct. 12, 1993; Tr. 1874; *Ahearn I*, 90 F.3d at 972.

Seventh, class counsel finally agreed to file this action under Rule 23(b)(1)(B) only after insurer Continental "brought its checkbook." Tr. 597. The settlement proponents all concede that Continental paid for this class to be certified as a Rule 23(b)(1)(B), non-opt-out, class. Tr. 56, 1445-46, 1572.

ARGUMENT

I. THE EXISTENCE AND SERIOUSNESS OF CLASS COUNSEL'S CONFLICTS OF INTEREST ARE QUESTIONS TO BE REVIEWED *DE NOVO*

The Fifth Circuit treated adequacy of representation as a question of fact, using an abuse-of-discretion review standard to uphold the district court's conclusion that this sprawling class was adequately represented by lawyers purporting to act on behalf of all absent class members. *Ahearn I*, 90 F.3d at 982. In class

actions, however, adequacy of representation is a constitutional guarantee, *Hansberry v. Lee*, 311 U.S. 32, 37 (1940); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464 (1918); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8 (1907), not a matter of historical fact. *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). On appeal, questions of constitutional moment are not left to the sound discretion of trial judges; they are reviewed *de novo*. *United States v. Bajakajian*, 118 S. Ct. 2028, 2037-38 n.10 (1998) (holding that where the question calls for "the application of a constitutional standard to the facts of a particular case, . . . *de novo* review of that question is appropriate."); *see also Peel v. Attorney Reg. & Disciplinary Comm'n*, 496 U.S. 91, 108-09 (1990).

In *Amchem*, this Court conducted its own review of the divergent interests of class members and concluded that the interests of subgroups within the class clashed enough to make the named representatives, purporting to act for everyone, inadequate. *Amchem*, 117 S. Ct. at 2250-52. In both *Amchem* and this case, the district courts issued detailed findings to the effect that intra- and extra-class conflicts were minimal and legally insignificant. *See Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 326-32 (E.D. Pa. 1993); *Ahearn I*, 90 F.3d at 976-82. This Court did not defer to those findings in *Amchem*, and it should not defer to such findings here. As Judge Smith explained:

> The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review *de novo* . . . . No factual dispute exists in this case, and therefore we must review the district court's decisions [on the existence of conflicting interests and the provision of adequate representation] *de novo*.

Ahearn I, 90 F.3d at 1010 (Smith, J., dissenting) (citations omitted).

This Court's *de novo* review of the conflicts in *Amchem* is consistent with its approach to conflicts in other settings. In *Cuyler*, this Court held that "whether multiple representation in a particular case gave rise to a conflict of interest . . . is a mixed question of law and fact." *Strickland v. Washington*, 466 U.S. 668, 698 (1984) (summarizing *Cuyler*). *Cuyler* involved a federal habeas corpus challenge to a state criminal conviction in which the ultimate question for the Court was whether due process had been violated on the ground that the defense lawyers had rendered ineffective assistance of counsel.

To answer that question the Court first had to decide whether counsel had engaged in multiple representation at all. The Pennsylvania Supreme Court held they had not. The federal court of appeals had reviewed the record on its own and held they had. This Court held that what the lawyers did was a question of fact, but whether that activity constituted "multiple representation" for purposes of conflict-of-interest analysis was a mixed question of law and fact. *Cuyler*, 446 U.S. at 342. *See also Kimmelman v. Morrison*, 477 U.S. 365, 381-92 (1986); *Strickland*, 466 U.S. at 698-701 (holding that both the performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of law and fact, and reviewing those questions *de novo*).

Thus, in the context of federal habeas petitions — where concerns about federalism, finality, discouraging defense lawyers from serving, and chilling the independence of counsel all weigh against a searching *ex post* inquiry of counsel's performance — this Court has nonetheless held that whether counsel had a conflict of interest and whether it was disqualifying are questions to be reviewed *de novo*. In the present case, in reviewing the adequacy of class counsel's representation in a federal court, federalism is not an issue. [3] Although finality is implicated in collateral attacks on class action judgments, this is a direct appeal. Given the fees

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[3] Federalism issues are involved in other aspects of the case, namely, the massive displacement of state tort law effected by this federal court-approved settlement.

to be made by serving as class counsel, this Court need not worry about chilling the willingness of lawyers to serve.

Most important, in class actions, unlike criminal proceedings, the concern that *de novo* review of the adequacy of counsel's representation will undermine counsel's independence from the court carries little weight. In criminal cases, the basic model of representation is client and lawyer together making the decisions and jointly constructing the representation. *De novo*, non-deferential judicial review of the adequacy of counsel's representation threatens to undermine that model because appellate courts might be too willing to overregulate lawyer conduct and second-guess lawyer decisions. Even so, *de novo* review is the rule with respect to federal habeas petitions.

In class actions, by contrast, Rule 23(e), which substitutes court approval of counsel's decisions for the approval of the absent clients, fundamentally alters the traditional relationship between counsel and the court. The basic model of representation in class actions is one in which the court, rather than the client, monitors counsel's actions. Therefore, concerns about counsel's independence from the court are far less significant in class actions than in criminal proceedings. In sum, there is no excuse for subjecting class counsel's adequacy and alleged conflicts of interest to a less searching review on appeal or in a collateral attack than that accorded similar questions raised in federal habeas petitions.

The Fifth Circuit's deference to the district court on the question of adequacy of representation, wrong under any circumstances, is even more troubling given that the district court's findings were built on a presumption of adequacy that was itself improper. According to the district court, "the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the Class." Pet. App. 502a (Dist. Ct. Conclusions of Law ¶ 60 (citing, *inter alia*, *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212 (5th Cir. 1981))). There are two problems with that approach.

First, using the "fairness" finding as a proxy for Rule 23(a)'s procedural protections is precisely the approach this Court rejected

in *Amchem*. *See* 117 S. Ct. at 2248-49. "Rule 23(a)(4) guarantees due process, and a substantively adequate result cannot cure procedural injustice." *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting). The Constitution does not promise absent class members fair resolutions, it promises them that they will not be bound to court judgments, however fair those judgments are, unless they have been adequately represented. "Due process must mean something other than the result is just; otherwise some lynchings would be consistent with due process." Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.* ("*Feasting*"), 80 CORNELL L. REV. 1045, 1123 (1995).

Second, "it is difficult to measure the precise effect on a defense [or a settlement] of a representation corrupted by conflicting interests." *Strickland*, 466 U. S. at 693. As Judge Smith put it, "an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest." *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting). *See also* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1266-68 (1995) (noting that a wide range of quite different class action settlements can be considered fair in a given situation). Thus, a presumption of adequacy based on the fairness of the overall settlement is not just wrongheaded as a matter of principle, it is wrongheaded as a matter of fact.

II. CLASS COUNSEL'S CONFLICTS RENDERED THEIR REPRESENTATION INADEQUATE UNDER RULE 23(a)(4) AND THE DUE PROCESS CLAUSE

A. The Intra-Class Conflicts Rendered Counsel and the Named Representatives Inadequate

The class approved by the district court was no more adequately represented than the class in *Amchem*. Here, as in *Amchem*, "the interests of those within the single class are not aligned." 117 S. Ct. at 2251. Just like the *Amchem* class, this one includes people now suffering from life-threatening and fatal illnesses as well as perfectly healthy people who may remain that

way or who may instead become quite ill in the future. "[F]or the currently injured, the critical goal is generous immediate payments." *Id.* For the currently healthy, the critical goal is "an ample, inflation-protected fund for the future." *Id.* These goals plainly conflict. Yet the named representatives, here as in *Amchem*, purportedly represented the interests of both groups at once.[4] As this Court held in *Amchem*, that is inadequate representation. Each group was entitled to one or more named representatives dedicated solely to that group's own interests, not to the good of the class as a whole.

The currently ill and currently well are not the only two groups in the Fibreboard class with interests that pull in opposite directions. In 1959, Fibreboard's insurance policy with Continental expired. *Ahearn I*, 90 F.3d at 1013 (Smith, J., dissenting). Those exposed to Fibreboard's asbestos products after 1959 thus "could only hope to recover from the non-insurance assets of Fibreboard, which amounted to very little." *Id.* Those exposed before 1959, on the other hand, had Fibreboard's insurance against which to assert a claim. That meant pre-1959 claims were substantially more valuable than post-1959 claims. *Id.* at 1013 & n.70 (Smith, J., dissenting). The class settlement — providing that the Trust created to make the payouts to class members would not distinguish between pre-1959 claimants and post-1959 claimants in awarding claimants damages — obliterated this distinction. *Id.* at 1013. A representative dedicated solely to the interests of the pre-1959 claimants would be focused on maintaining the privileged position of those people in any global settlement. The pre-1959 folks had no such champion.

We might all agree with the Fifth Circuit that the "fairest" overall result in this situation, viewed in abstract, would be to wipe out the fortuitously privileged position of the pre-1959 claimants.

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[4] The same can be said of the guardian appointed for the class. Indeed, all arguments in this section apply equally to the guardian appointed late in the process to represent the class as a whole. Because the same conflicts problems discussed in this section plague the guardian in this case, the guardian could no more cure the intra-class conflicts than could any of the other players (the named representatives and class counsel) who purported to act for the class as a whole.

But due process promises the pre-1959 absent class members that their position will be represented. In this context, to be represented means to have one's position advocated by someone who does not owe any substantial loyalty to those whose interests are opposed to one's own. The pre-1959 claimants were denied this. No further showing of adverse effect or prejudice is necessary. *See Amchem*, 117 S. Ct. at 2251 (holding that the denial of separate representation alone was enough to show a denial of adequate representation).

Named representatives are an inadequate solution to the problem. In most class actions the class representatives play very little role in advising on settlement terms, attorney's fees or any other matter. The district court here was right when it recognized that class counsel — not the named representatives — are the key to the class's representation. Pet. App. 483a-484a (citing and quoting other cases, including *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973), holding that: "[T]he primary criterion for determining whether the class representative has adequately represented the class . . . is whether the representative *through qualified counsel*, vigorously and tenaciously protected the interests of the class.") (emphasis added by district court).

In *Amchem*, the class representatives knew very little about the details of the settlement and next to nothing about the alleged conflicts of class counsel. *See* Koniak, *Feasting*, 80 CORNELL L. REV. at 1070. Here, the named representatives were not even selected until after a settlement in principle had been reached, and "they relied on Class Counsel in the subsequent settlement negotiations" to finalize the class settlement. Pet. App. 483 (Dist. Ct. Conclusions of Law ¶ 24).

Given the actualities of class action practice, requiring separate named representatives for conflicting subgroups within the class while allowing one group of lawyers to act on behalf of the whole would be pointless. Even assuming that the reference in *Amchem* to named representatives who have a "proper understanding of their representational responsibilities" was meant to signal this Court's disapproval of know-nothing named plaintiffs, in most class actions counsel will retain enormous control over decisions

critical to the absent class members. *See Amchem*, 117 S. Ct. at 2251. For that reason, this Court should emphasize that absent class members are entitled to lawyers, not just named representatives, who are free of serious conflicts — lawyers focused on the relevant subgroup's interests, not on some generalized notion of the good of the entire group.

On remand, the Fifth Circuit's terse opinion points to two distinctions between *Amchem* and this case that supposedly make separate representation unnecessary here: this class is certified under Rule 23(b)(1)(B); and the settlement here does not specify how much money claimants with various illnesses are eligible to receive. *Ahearn II*, 134 F.3d at 669-70. Neither of these distinctions matters.

1. Rule 23(b)(1)(B) certification. As to the Fifth Circuit's first proposed distinction, that certification under Rule 23(b)(1)(B) makes separate representation unnecessary, nothing in Rule 23(a)(4), this Court's cases on the constitutional guarantee of adequacy, nor reason, suggests that the standards for adequate representation are or should be more lax when absent class members are denied the chance to opt out of the proceeding. Indeed, this Court suggested in *Amchem* that in limited fund cases, as this one is alleged to be, the conflicts problem would be exacerbated. 117 S. Ct. at 2251 ("Although [*Amchem*] is not a 'limited fund' case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability."). *See Walker v. Liggett Group*, 175 F.R.D. 226, 231 (S.D. W. Va. 1997) (reading *Amchem* this way and applying its requirement of separate representation to a class certified under Rule 23(b)(1)(B)).

Equally as important, no one has ever contended that this class was proposed as a Rule 23(b)(1)(B) class because the settlement's negotiators believed at the time that Rule 23(b)(3) could not be used to certify this class. In fact, everyone admits that the Rule 23(b)(1)(B) mechanism was chosen because Continental would not settle unless the absent class members were denied opt-out rights. *Ahearn I*, 90 F.3d at 970. Numerous times during the fairness

hearing (and without contradiction from anyone) the settlement proponents stated that Continental "paid" to get class counsel to accede to promoting this class as a non-opt-out class, meaning that Continental had to add money to the settlement fund to get this result. Tr. 56, 597, 1445-46, 1572. Trading money for opt-out rights may serve the class as a whole in one respect by increasing the total pot of money, but it does so at the expense of those within the class for whom the right to opt out is most valuable — namely, all those who are currently very ill and have no interest in giving up their right to claim punitive damages or their right to collect more than $500,000 through the tort system. That is precisely the kind of trade-off denounced by this Court in *Amchem*.

As this case demonstrates, defendants and class counsel can and do bargain over which subsection of Rule 23(b) to use. No matter how much this Court's opinion in this case clarifies the circumstances in which opt-out rights attach, thereby making it more difficult for defendants and class counsel to bargain over the opt-out rights of absent class members, smart lawyers will undoubtedly find and exploit the areas of grey. This is an unavoidable reality. What is avoidable, however, is the judicial approval of any such bargain when it represents the sacrifice of the interests of absent class members by counsel encumbered by serious conflicts. We thus urge the Court to hold that class counsel who sell the protections put in place for absent class members (*Amchem*'s holdings on predominance, superiority, adequacy and Rule 23(b)(3)'s opt-out rights) as a means of getting the class as a whole a "deal" are rendered inadequate representatives by that conduct alone. At a minimum, such bargaining should raise a presumption that the class was inadequately represented. Moreover, this Court should denounce the Fifth Circuit's approach, which allows a bargained-for class definition to lower the bar of adequacy.

2. Absence of allocation decisions. The Fifth Circuit's other reason for believing that *Amchem*'s conflicts analysis does not apply here is that the settlement does not make allocations based on severity of illness. The Fifth Circuit's per curiam opinion does not explain why this is a cogent distinction. To the extent that we

can make sense of this claim, the Fifth Circuit appears to be saying that the absence of actual allocation decisions in the settlement somehow washes away the conflicts. There are three problems with this claim.

First, it is untrue. The settlement does make allocation decisions among subgroups with seriously divergent interests. Among these are: decisions wiping out the difference between pre- and post-1959 class members, *Ahearn I*, 90 F.3d at 982; the inclusion of so-called spendthrift provisions, which limit payouts in any one year to preserve money for the class members making claims later, *id.* at 973; the $500,000 cap on recoveries and the elimination of the right to claim punitive damages for those who exit to the tort system, *id.*; and the provision that the sickest claimants must get paid 100 cents on the dollar in years in which there are overflow claims, before one cent can be paid to the not-quite-so-sick. *Id.* Indeed, the whole point of the settlement is acknowledged by all to be to protect the currently well from the eventuality that the money will be gone when they get sick. *Ahearn II*, 134 F.3d at 669-70; *Ahearn I*, 90 F.3d at 973; Pet. App. 365a-366a.

Second, delegating the other allocation decisions to the trustees of the Trust to be created under the Global Settlement Agreement for later determination does nothing to cure the conflicts within the class. Consider, for example, the conflict between the "near" and "far" futures. Whenever the allocation decisions are made, the primary goal of the "far futures" would be to guarantee the solvency of the fund and the primary goal of the "near futures" would be to increase payouts now. A lawyer charged with representing the interests only of the "far futures" would argue first and foremost for solvency protections. A lawyer charged with representing "near futures" would resist in the name of larger payouts now. Shifting the conflict to a later point in time does nothing to change it. Counsel who delegate the resolution of conflicting interests to agents (here, the trustees) charged with protecting the interests of the whole are no more adequate than counsel who would delegate that task to named plaintiffs purporting to represent the class as a whole, or counsel who take on that task themselves.

Third, the Fifth Circuit's allocation distinction boils down to this ludicrous proposition: counsel who provide less information and less certainty to absent class members regarding the amount of money they might receive under a settlement thereby render more adequate representation than counsel who provide more information and more certainty. For all its flaws, the *Amchem* settlement at least provided some concrete information on the amount of money absent class members might recover should they eventually develop a certain illness. That was a virtue in the *Amchem* settlement; it was not a problem. The problems of *Amchem* are present here, but the virtue is missing. As it relates to adequacy, the lack of information in this settlement cuts against the quality of representation, not in favor of it.

B. The Extra-Class Conflicts Rendered Counsel Inadequate

As serious as the intra-class conflicts are in this case, they pale in significance to class counsel's extra-class conflicts. Similar conflicts were present in *Amchem*, as the Court's recitation of facts in that case discloses. 117 S. Ct. at 2239 (referring to class counsel's simultaneous representation of their own clients whom they excised from the larger class settlement). The Court did not discuss the issues posed by such conflicts in *Amchem*. It should here.

Simply put, the extra-class conflicts arose in this case, as in *Amchem*, because class counsel represented contemporaneously two sets of clients, namely, clients they put within the class and clients they put outside the class. These two groups of clients received significantly different treatment, with the clients excluded from the class retaining all their due process rights, including an unlimited right to sue in court. In this sense, the clients outside the class got the better deal. No rationale for the classification of these two groups withstands scrutiny other than the fact that everyone put outside the class had an actual attorney-client relationship with class counsel or another asbestos lawyer. The conflicts for class

counsel were thus serious and in fact manifested.[5]

The terms invented by the settlement proponents to describe this class action obscure the seriousness of the extra-class conflicts. Unfortunately those terms — "futures-only class," "futures" and "presents" — have become the language of this case, adopted by the majority and the dissent below and used even by the objectors. To expose the depth of class counsel's conflict, however, we must more carefully define these terms.

In what sense is this class a class of "futures"? There are currently ill people in this class; there are currently well people in this class who may or may not get sick in the future; and there are future people in this class (people who may be born to the current people in the class, and people who may someday marry a class member). As of August 27, 1993, when this class action was filed, absent class members were all "futures" in only one shared sense: they had not yet filed, or settled an unfiled claim, against Fibreboard. One might then justify the term "futures" by explaining that it means persons who may file a claim in the future.

The problem with that explanation is that the "presents" also include persons who may file claims in the future. The class definition excludes from the class not just those who have filed or settled unfiled claims against Fibreboard as of August 27, 1993 (a group that might sensibly have been referred to as "present claimants"), but also people who had settled with Fibreboard for relatively minor injuries but who retained the right to sue Fibreboard in the future should they develop a malignancy. Pet. App. 544a-545a ("[T]he class does not include persons who filed and, for cash payment or some other negotiated value, dismissed

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[5] We do not see how a guardian's approval of the settlement and the processes used to reach the settlement should carry any more weight than the district court's approval of the settlement and those processes. If district court approval of the settlement is no substitute for unconflicted counsel, it necessarily follows that a guardian's approval is no substitute. Even the ethics expert produced by the settlement proponents appeared to accept this proposition. Tr. 2349. Similarly, if a district court's conclusion on "adequacy" is subject to *de novo* review, so too are the guardian's conclusions on this subject on which the district court presumably relied.

claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy."). At best, those people are half-presents/half-futures with the emphasis on the future half, which represents the more valuable of the two claims. The only sense, then, in which all the "presents" are exclusively "presents" is that *each of them had a present association with an asbestos lawyer*, either as a current client, a past client, or a past client who might well return to that lawyer should that client manifest cancer traceable to asbestos.

This review of what "presents" and "futures" means leads to the following conclusion: in drafting the class definition, class counsel assigned people who were similarly situated, except with reference to their association with class counsel or another asbestos lawyer, to different groups. Some people dying of mesothelioma in the summer of 1993 were assigned to the class, which meant that they and their survivors lost their right to bring suit immediately and to recover more than $500,000 in the tort system or seek punitive damages. Other people dying of mesothelioma in August of 1993, clients of class counsel or another asbestos lawyer, gave up none of those rights. Some people who may develop cancer in the future were assigned to the class; others in the same condition were called "presents" and again retained all their rights.

The class boundary line proposed and supported by class counsel bears no relationship to the common interests of law and fact advanced by the settlement proponents and accepted by the courts below to justify the class action form. The district court found and the Fifth Circuit accepted that the class had the following issues in common:

> *[i]* avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; *[ii]* maximizing the total settlement contribution from Fibreboard and the Insurers; *[iii]* streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; *[iv]* minimizing the percentage of their compensation diverted from the fund to pay attorney's fees; and *[v]*

adopting procedures that provide for payments to claimants in an equitable manner.

Ahearn I, 90 F.3d at 981.

As to each of these issues, the "futures" outside the class and those inside the class were, and remain, identically situated. Every other claimant outside the class was identically situated with respect to all class members concerning every one of these issues except *[iii]*. In fact, those outside the class and those inside the class had the same interest in streamlining the system until class counsel separately settled the claims of the "presents" and agreed to a class boundary that allowed other asbestos lawyers to do likewise. Class counsel cannot seriously claim that a difference they created somehow justifies the difference they created.

The oddly shaped class produced by class counsel's definition not only bears no relationship to the class's common interests, but it subjects similarly situated people to wildly different treatment. Some people exposed to Fibreboard's products get an automatic opt-out from this purportedly "non-opt-out" class, retaining full access to the tort system in the event they develop cancer. Why? Because they are or were once associated with class counsel or another asbestos lawyer. Were this a law that denied access to the courts to everyone exposed to a particular product except those who had had a lawyer settle some other claim for them sometime in the past, there is serious doubt as to whether it would pass muster even under the relatively undemanding rational relationship test for ordinary equal protection and substantive due process challenges. *See, e.g.*, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 173-79 (1980).[6] Courts must hold unelected,

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[6] This is not to say that the rational relationship test would be appropriate here, where procedural due process rights are at stake. But reference to the test highlights how low a standard of adequacy is implicit in the decision of the courts below. Of course, this is ostensibly the settlement of a judicially cognizable controversy and not legislation. *But see Ahearn I*, 90 F.3d at 1017-19, 1023 (Smith, J., dissenting) (questioning whether this settlement satisfies Article III's "case or controversy" requirement, and labeling it legislative in nature). As we explain in the text, however, the fact that class counsel are less accountable to those they serve cuts in favor of a more stringent standard of conduct, not a weaker or equal standard, and cuts against judicial deference.

largely self-appointed agents, like class counsel, to a higher standard of responsibility than elected and thus more accountable representatives, particularly when the acts of those agents determine the due process rights of those for whom the agents purport to act.

When class counsel were busy negotiating with the defendant parties over the class definition, they had fiduciary responsibilities to all those for whom they purported to speak — their own "presents," the "presents" of others, and those who would later become absent class members. A lawyer who purports to act in this legal capacity on behalf of another thereby assumes responsibilities to that person, including the responsibility to avoid conflicts of interest. See *Westinghouse v. Kerr-McGee*, 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), and cases cited therein. Even the ethics expert produced by the settlement proponents concurred with this proposition. Tr. 2319-20. By agreeing to a class definition that bears no relationship to the common interests of those individuals whose interests counsel was bound to protect, class counsel breached their fiduciary duties. By agreeing to a class definition that arbitrarily preserves the rights of some who may develop cancer in the future and denies similar rights to the rest, class counsel breached their fiduciary duties. By agreeing to what can only be described as a class definition gerrymandered to protect class counsel's own financial interests and the financial interests of other asbestos lawyers, class counsel breached their fiduciary duties. To call such conduct adequate representation is to empty the term of meaning.

Instead of treating the class definition as evidence, if not conclusive proof, of inadequacy, the courts below treated the class boundary line as if it captured categories existing in the natural world. *See, e.g.*, Pet. App. 502a (Dist. Ct. Conclusions of Law ¶ 61). The district court noted that the ethics rules "should not be mechanically applied to the problems that arise in the settlement of class action litigation," Pet. App. 503a-504a (Dist. Ct. Conclusion of Law 65 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986))). It then ignored the most salient distinction between conflicts that arise in the "'traditional' lawyer-client context," *id.*, and those inherent in the class action

before it: in class actions the client is constructed by counsel. Class counsel may demonstrate their inadequacy, their willingness to put self-interest or the interest of others above their duty to protect and treat fairly those whom they purport to serve, by choosing to construct one class instead of another. That is what happened here. This gerrymandered class is the artifact of class counsel's conflicts.

The extra-class conflicts in this case do not end with the gerrymandered class. Class counsel negotiated a deal for the so-called "presents" that called for the defendant parties to double payment to those people upon the consummation of a settlement for the "futures." That gave the "presents" and class counsel an interest in a class settlement that was in conflict with the interests of the class. Simply put, class counsel had a duty to the "presents" to get a class settlement — any class settlement — that would survive court review.

As Judge Smith explained in dissent, "[class counsel] and the individual plaintiffs had a financial interest in seeing the class settle on *any terms*." *Ahearn I*, 90 F.3d at 1010 (Smith, J, dissenting) (emphasis in original). By contrast, the class's interest was in the best settlement possible, but only if that settlement was better than no settlement at all. In the absence of a class settlement, the class would be left to face the risk that Continental's assets would be unavailable to meet future claims. Pet. App. 266a-276a (describing coverage dispute between Continental and Fibreboard). In other words, the class would face the risk that Fibreboard would lose the coverage case, leaving it and future claimants without Continental's insurance money. That does not mean, however, that any class settlement was better for the class than no class settlement. It means that the class had no interest in any settlement less lucrative than what it stood to gain by a Fibreboard victory in the coverage case, discounted by the chance that Fibreboard might lose.

By contrast, non-class members had an interest in any class settlement that could win court approval. That is so because the so-called "presents" stood to gain precisely the same amount — the other half of their money — whether Fibreboard won the coverage case or a class settlement was approved. *See Ahearn I*,

90 F.3d at 971 n.3. Thus, for non-class members, any class settlement that a court would approve would be as good as a win in the coverage case, whereas for the class some subset of "settlements that could win court approval" would be worth rejecting.

Making matters worse, for class counsel, any court-approved settlement would be better than, not just equal to, a win in the coverage case. That is so because in the event of a class settlement they stood to gain: (1) their percentage of the contingent half of the "presents" payments; and (2) class counsel fees. A win in the coverage case only ensured class counsel of the first of those payments. Tr. 398-99 (noting that, while class counsel had announced their intention to seek a fee award even if the class settlement was rejected on the ground that they had been instrumental in achieving the Trilateral Agreement, neither Fibreboard nor Continental had agreed to support any such bid for fees). In short, some settlements not in the class's interests were in the interests of both the "presents," to whom class counsel owed a duty, and class counsel themselves.

The conflict created by the contingency built into the "presents" deal did not end with the negotiation of the class settlement. The deal called for court approval of the settlement; class counsel then throughout the fairness hearing had an obligation to their "presents" to win approval, interceding events notwithstanding. The district court papered over the conflicts created by the contingency feature of the "presents" deal by asserting that the fact that the "presents" and class counsel benefitted only from a court-approved class settlement somehow brought the divergent interests of class counsel, the "presents," and the class into harmony. Pet. App. 406a-407a (Dist. Ct. Findings of Fact ¶ 328). The biggest problem with this reasoning is that it ignores the role that the law assigns class counsel in the fairness hearing. *See, e.g.*, *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) (one of the six factors to be considered in assessing the fairness of a settlement is "the opinions of the class counsel"). The conflict created by and for class counsel because of the contingent "presents" deal, which they negotiated, cannot be mitigated by the fact that the contingency included winning district

court approval. What class counsel do and fail to do can affect the court's judgments at every stage of the process. It is certainly within the power of settlement proponents to "put one over on the court, in a staged performance." *Amchem*, 117 S. Ct. at 2249 (quoting *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc)).

The question to be answered under Rule 1.7(b) of the *ABA Model Rules of Professional Conduct* (1984), which the courts below and all parties agree is the relevant standard for assessing class counsel's conflict, is whether it is reasonable to believe that a lawyer's representation will be materially limited by duties to another or the lawyer's own financial interests. Both in the negotiation of the class deal and in helping to win court approval of this settlement, class counsel's representation of the class was materially limited by the fact that no matter how much in the class's interests a certain action might have been, class counsel's duties to their "presents" prevented counsel from doing anything that would jeopardize the class settlement or cause the district court to reject the settlement. Class counsel in that position is not an adequate representative. *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) (disqualifying class counsel because of counsel's conflicting obligations to another concurrently represented class).

Finally, to justify its holding that class counsel acted appropriately in simultaneously negotiating with the defendant parties on behalf of the class and another group, the district court cited *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1426-27 (D. Minn. 1987). *Holden* involved an employment discrimination case brought under Rule 23(b)(2). While negotiating the *Holden* settlement, class counsel also negotiated the settlement of six other cases that they were litigating against the same defendant. *Id.* at 1425. The *Holden* court relied on the fact that the class notice had disclosed counsel's role in the other litigation. *Id.* at 1426. We do not believe that notice should ever substitute for unconflicted counsel. Moreover, if notice of the conflict could ever cure the problem, it would surely not cure the

problem in a case where the class was composed largely of people unlikely to be aware of their relationship to the proceeding because they were not yet ill and were unaware that they had been exposed to a dangerous substance.

Dissenting in this case, Judge Smith advocated a ban on parallel representation by class counsel, and for the reasons he gave we support his position. *Ahearn I*, 90 F.3d at 1011. *See also* Comment to Rule 1.7(b) of the *Massachusetts Rules of Professional Conduct* (1997) (banning simultaneous representation in class actions). Here, however, class counsel's representation raised more problems than mere parallel representation. Class counsel created a gerrymandered class that can only be understood as designed to serve the interests of non-class members (their clients outside the class), by assigning similarly situated people to groups destined to receive disparate treatment, with absent class members on the losing side of that equation. Class counsel negotiated a deal for the class that gave class counsel and their *other* clients an interest in whether a class settlement was reached, thereby disabling class counsel during the class negotiations and the subsequent fairness hearing from doing anything but pushing this settlement forward. If such representation counts as adequate representation, this Court might just as well announce that absent class members are not entitled to counsel at all.

III. THE FEWER OTHER PROCEDURAL PROTECTIONS AFFORDED CLASS MEMBERS, THE MORE DEMANDING MUST BE A COURT'S SCRUTINY OF CLASS COUNSEL'S INDEPENDENCE, LOYALTY, DILIGENCE, AND COMPETENCE

"Class counsel confined to settlement negotiations [cannot] use the threat of litigation to press for a better offer." *Amchem*, 117 S. Ct. at 2248-49 (citing John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1379-80 (1995)). It is undisputed here that counsel had no intention of seeking to have this class certified for trial. Tr. 685, 1593. In negotiating a settlement, counsel unable or unwilling to go to trial have little, if any, leverage at the bargaining table.

Here, the settlement proponents claim that external events, such as the impending decision in the coverage case, more than compensated for class counsel's otherwise weak bargaining position. The courts below accepted that argument. But the uncertainty about insurance coverage does nothing to show that this particular group of plaintiffs' lawyers had any leverage. If the would-be class counsel resisted defendant's demands, the defendant could have threatened to find another, more cooperative plaintiff's lawyer with whom to make a deal. If plaintiff's counsel cannot threaten to go to trial at that point, would-be class counsel has only two choices: capitulate to the defendant's demands or watch the defendant find some other lawyer who will do so, making that new lawyer the one eligible for class counsel fees.

Here, the settlement proponents asserted, and the courts below accepted, that the Ness Motley firm had to be class counsel for a class settlement to be credible. Pet. App. 293a-294a (Dist. Ct. Findings of Fact ¶¶ 91-92); *see also Ahearn I*, 90 F.3d at 989. Whether Ness Motley's participation was so necessary that it made up for counsel's inability to go to trial is, however, not a question ruled on by the courts below. It should have been.

In *Amchem* this Court suggested that a class unmanageable for trial could nonetheless be certified for settlement, which means that class counsel unable to proceed to trial might nonetheless be adequate. 117 S. Ct. at 2247. In *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373-87 (1996), this Court held that a class action settlement may include claims that cannot be tried by the court certifying the class, which implies that class counsel who settle claims that they could not bring to trial, at least not in their chosen forum, may be adequate.

When the defendant's assent is necessary to class counsel's obtaining certification of the class action, as it is with every so-called "settlement class" that is unfit for trial certification, the defendant is free to shop around for the plaintiff's lawyer willing to sell out the class for the least money. Plaintiff's lawyers are thus encouraged to compete for lucrative positions as class counsel based on their disloyalty to the class. *See* Coffee, *supra*, at 1347-48 (describing this race to the bottom). To preserve the guarantee

of adequate representation from the perverse incentives created by a world in which settlement class actions are routine, this Court could hold that no class can be certified for settlement that could not be certified for trial. Alternatively, this Court could hold that the requirements of Rule 23(a)(4) may be met as long as a court finds that the class might be able to be certified for trial — a finding that would be reviewed by the trial court *de novo* if the settlement failed and the defendant chose to fight certification. Finally, the Court could hold that a presumption of inadequacy attaches whenever counsel present a settlement for approval on behalf of an inchoate class that appears to be uncertifiable for trial purposes. To overcome this presumption, class counsel would have to provide convincing evidence that something else provided counsel with leverage comparable to that counsel would have been able to wield by threatening trial.

As a group, we take no position on the first two options. At a minimum, however, the Court should adopt some form of our third option. The courts below treated class counsel's inability or unwillingness to proceed to trial as calling for no special scrutiny of counsel's adequacy. We urge the Court to reject that approach.

As mentioned earlier, the named representatives in this case were not selected until counsel had reached a settlement in principle, and thereafter the named representatives contributed little, if anything, to the settlement process. This Court should consider whether named representatives who are so uninvolved can ever be adjudged adequate. If not, what level of involvement is expected of the named representatives? At a minimum, this Court should make clear that when named representatives amount to little more than figureheads, class counsel's performance and potential conflicts will be scrutinized much more carefully.

The fewer other procedural protections are accorded absent class members, the more pressure is placed on the concept of adequacy as the centerpiece or only piece of due process. This Court should emphasize that inquiry into class counsel's adequacy must be all the more stringent whenever other procedural protections are lacking, as in non-opt-out classes, or less reliable, as in the case of notice given to a futures class.

The loose standards employed to judge the adequacy of class counsel's representation in this case are unfortunately more the norm than the exception. All too often, scrutiny of class counsel's adequacy is perfunctory, a practice this Court should denounce as inappropriate even in those cases where other procedural protections are provided to absent class members. Throughout this brief we have been careful to avoid language that would suggest that an inadequate class lawyer is the equivalent of an unethical lawyer. First, we do not believe that the due process guarantee is coextensive with any particular version of the ethics rules. *See Strickland*, 466 U.S. at 688-90. Second, court review of class counsel's adequacy may be less than vigorous in part because judges are loathe to pronounce lawyers "unethical." We have been careful to speak of counsel's adequacy as a matter of due process and not as a matter of morality. This way of speaking may help the lower courts take the entire business more seriously and approach the task with less hesitancy.

CONCLUSION

The Fifth Circuit's decision should be reversed.

Respectfully submitted.

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APPENDIX

LISTING OF *AMICI CURIAE*

Name	Law School*
Jack M. Beermann	Boston University
Kevin M. Clermont	Cornell University
George M. Cohen	University of Virginia
Roger C. Cramton**	Cornell University
William N. Eskridge, Jr.	Yale University
Marc S. Galanter	University of Wisconsin
Leonard Gross	Southern Illinois University
Robert B. Kent	Cornell University
Susan P. Koniak**	Boston University
Jules L. Lobel	University of Pittsburgh
Richard W. Painter	University of Illinois
Jeffrey J. Rachlinski	Cornell University
Deborah L. Rhode	Stanford University
Thomas Ross	University of Pittsburgh
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Gene R. Shreve	University of Indiana-Bloomington
William H. Simon	Stanford University
Rhonda S. Wasserman	University of Pittsburgh
Charles W. Wolfram	Cornell University

* For identification purposes only; the positions set forth in this brief are solely those of *amici*.

** Roger C. Cramton and Susan P. Koniak did not participate in any capacity in the present case. They were expert witnesses on behalf of the objectors at the fairness hearing in *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314 (E.D.Pa. 1993), which reached this Court as *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The counsel who hired them in *Amchem* are also representing the objectors in the instant case.